The Scottish Parliament
Pàrlamaid na h-Alba

HEALTH AND SPORT COMMITTEE

AGENDA

10th Meeting, 2012 (Session 4)

Tuesday 13 March 2012

The Committee will meet at 10.00 am in Committee Room 4.

1. **Subordinate legislation:** The Committee will consider the following negative instrument—

   Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI/2012/36).

2. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—

   Patient Rights (Scotland) Act 2011 (Commencement) Order 2012 (SSI/2012/35(C.7)).

3. **Inquiry into integration of health and social care:** The Committee will take evidence from—

   Lynn Williams, Policy Officer (Scotland), The Princess Royal Trust for Carers;

   Martin Sime, Chief Executive, Scottish Council for Voluntary Organisations;

   Ranald Mair, Chief Executive, Scottish Care;

   Annie Gunner Logan, Director, Coalition of Care and Support Providers in Scotland;

   Henry Simmons, Chief Executive, Alzheimer Scotland;

   and then from—

   Andrew Lowe, President, Association of Directors of Social Work;

Theresa Fyffe, Director, Royal College of Nursing Scotland;

Dr John Gillies, Chair, Royal College of General Practitioners Scotland;

Phil Gray, Chief Executive Officer, Chartered Society of Physiotherapy.

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The papers for this meeting are as follows—

Agenda Item 1

Note by the clerk	HS/S4/12/10/1

Agenda Item 2

Note by the clerk	HS/S4/12/10/2

Agenda Item 3

Submission from the Scottish Council for Voluntary Organisations	HS/S4/12/10/3
Submission from Scottish Care	HS/S4/12/10/4
Submission from the Coalition of Care and Support Providers	HS/S4/12/10/5
Submission from Alzheimer Scotland	HS/S4/12/10/6
Submission from the Association of Directors of Social Work	HS/S4/12/10/7
Submission from the Royal College of Nursing Scotland	HS/S4/12/10/8
Submission from the Royal College of General Practitioners Scotland	HS/S4/12/10/9
Submission from the Chartered Society of Physiotherapy	HS/S4/12/10/10
PRIVATE PAPER	HS/S4/12/10/11 (P)

Subordinate Legislation Briefing

Overview of instrument

1. There is one negative instrument for consideration.

2. A brief explanation of the instrument is set out below. If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Government in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Details on the instrument

3. The Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI/2012/36) make provision about the arrangements to be put in place in terms of section 15 of the Patient Rights (Scotland) Act 2011 in relation to the handling of feedback, comments and concerns received in relation to health care, and, in particular for the purposes of dealing with complaints raised in relation to health care.

4. The Subordinate Legislation Committee has drawn the instrument to the Health and Sport Committee's attention and its report is included as an annexe.

5. The official report of the Subordinate Legislation Committee's meeting when it considered this instrument can be accessed here: http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6889&mode=pdf

6. There has been no motion to annul this instrument.

Dougie Wands
Clerk to the Committee

Annexe

Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI 2012/36) *(Health and Sport Committee)*

This instrument makes provision about the arrangements under section 15 of the Patient Rights (Scotland) Act 2011 which NHS bodies have to put in place for the handling of feedback, comments and concerns received in relation to health care.

The principal requirements are: the appointment of a feedback and complaints officer and a feedback and complaints manager; the keeping of written records; and time limits of three days for acknowledging and 20 days for reporting on complaints.

The Regulations also specify who may give feedback or raise complaints and which complaints are not to be covered by the section 15 arrangements (primarily because they are dealt with under a different scheme).

The Regulations are subject to the negative procedure and come into force on 1 April 2012.

In considering the instrument, the Committee asked the Scottish Government for clarification of certain points. The correspondence is reproduced in Appendix 2.

Section 15(3)(a) of the 2011 Act provides that complaints can be made by or on behalf of patients, and section 15(4)(a) permits the Scottish Ministers to extend the scope of the scheme by specifying “other persons” who may make a complaint or on whose behalf a complaint can be brought. This power is exercised by regulation 4, which specifies “any person who is, or is likely to be affected by an act or omission of responsible body”—that is, a relevant NHS body or service provider.

The Scottish Government was asked why it considers such an extension to the scheme compatible with the right to privacy under Article 8 of the European Convention on Human Rights, given that there is no requirement for the patient to which the complaint relates to consent to the complaint or any other restriction on those persons who may complain in relation to care received by someone else.

The Scottish Government was also asked whether regulation 4 is competent, given that it specifies “any person who is, or is likely to be affected by an act or omission of a responsible body”. That would seem to include persons who could make a complaint by or on behalf of a patient by virtue of section 15(3)(a)(i) of the 2011 Act, although it is clear from the terms of section 15(3)(b)(ii) that such persons cannot be specified using the power in section 15(4)(a).

In its response, the Scottish Government stated that the responsible body will have to take the circumstances of a complaint into account and be satisfied that it is acting in accordance with the ECHR and any other law, such as the Data Protection Act 1998. The Committee notes that such obligations will also be highlighted in good practice guidance that is being issued to support the implementation of the legislation.

The Scottish Government also accepted that regulation 4 could have been more clearly expressed to clarify its intention. However, it considered that regulation 4 falls to be interpreted as specifying persons only to the extent that they are "other persons" than those referred to in section 15(3)(a)(i).

The Committee accepts that responsible bodies are under a separate statutory duty to exercise their functions in a way that is compatible with the ECHR and must fulfil their obligations under the Data Protection Act 1998. However, it considers that there is a lack of clarity within these Regulations regarding the restrictions on responsible bodies in their dealing with and reporting on complaints.

Similarly, the Committee accepts the Scottish Government's view that what is specified in regulation 4 must be read as excluding what could not be specified, even though that is not expressly stated. However, the Committee considers that the drafting is not as clear as it could be.

The Scottish Government was also asked about the intended effect of the consequential provisions made in the Schedule to the Regulations and an explanation of the powers used to make such provision.

In its response, the Scottish Government explains that some of the provision made in the Schedule is supplemental to other provisions of the 2011 Act more generally, rather than consequential upon the provision being made in this instrument in relation to section 15 of the Act. The Scottish Government explains that it relies on the power in section 25(1)(c) of the 2011 Act, which when added to the power in section 15 allows the Scottish Ministers to make such consequential, supplemental, incidental, transitional, transitory or saving provision as appears to the Scottish Ministers to be necessary or expedient in conjunction with the exercise of the power in section 15.

The Committee notes that the drafting of the instrument does not refer to making supplemental provision: the Schedule is headed and regulation 9(4) refers to "consequential provisions" only. That is also reflected in the title of the instrument. However, the Committee agrees with the Scottish Government that some provisions appear to be supplemental to the Act as a whole rather than consequential upon the exercise of powers in section 15. For example, the amendment in paragraph 1(5) of the Schedule provides that health boards can vary contracts without the contractor's consent in order to comply with any section of the 2011 Act, rather than solely the complaints scheme under section 15.

The Committee notes that such amendments are not consequential on the provision made by the instrument in relation to section 15 but that they could well be an expedient consequence of the remainder of the 2011 Act. The Committee considers this could be beyond the scope of the limited ancillary power available in section 25(1)(c). The Committee notes however that there is a stand-alone ancillary power in section 24 of the 2011 Act, which was provided for the specific purpose of making provision which is consequential or supplemental to the Act as a whole. As such, the Committee accepts that the instrument is within *vires* but considers that the Scottish Government has not cited the correct powers in the preamble to the instrument. Furthermore, it notes that the Scottish Government now advises that it is making

supplemental as well as consequential provision, although the instrument was drafted on the basis that it makes only "consequential provision".

Finally, the Scottish Government was asked to clarify where copies of "the 2005 Directions" could be found. The Directions contain part of the current complaints procedure and are relevant to the transitional arrangements made for former complaints. It was not evident from the instrument where they could be found, but further helpful details are provided in the Scottish Government's response. The Committee notes that it would have been helpful to readers if that information had been provided in the Explanatory Note in accordance with the Scottish Government's drafting guidance.

The Committee therefore draws the instrument to the Parliament's attention under reporting ground (h) as the following matters could have been more clearly expressed. First, the instrument could have made clearer the limitations on the investigation and reporting duties imposed on responsible bodies by regulation 6 necessary to ensure compliance with article 8 of the ECHR and the Data Protection Act 1998 and to maintain patient confidentiality. Secondly, the specification of the additional persons who may make complaints or give feedback in regulation 4 includes persons already covered by section 15 of the 2011 Act.

The Committee also draws the instrument to the Parliament's attention under the general reporting ground as there has been a failure to follow normal drafting practice in the following respects. The instrument makes supplemental provision in addition to consequential provision but the powers relied on to do this have not been expressly cited in the preamble, nor does the instrument itself refer to supplemental provisions being made. Additionally, information as to where copies of the 2005 Directions can be obtained was not provided in the instrument or the explanatory note, contrary to normal drafting practice.

APPENDIX 2

Patient Rights (Complaints Procedure and Consequential Provisions) (Scotland) Regulations 2012 (SSI 2012/36)

On 15 February 2012, the Scottish Government was asked:

1. To explain why the Scottish Government considers the scheme for handling complaints which includes the requirement for a report of investigations to be issued to **any complainant** is compatible with Article 8 of ECHR, given that there is no requirement that the patient who received the health care to which the complaint relates has consented to the complaint being made or otherwise restricting those persons who may act as a complainant on the patient's behalf or in relation to health care provided to another person (for example a parent of a child), in contrast to the existing complaint schemes which these regulations replace – see for example paragraph 83 of SSI 2004/115.

2. Whether regulation 4 is considered to be competent given that it prescribes "**any person** who is, or is likely to be affected by an act or omission of a responsible body" for the purposes of section 15(3)(a)(ii) of the 2011 Act. Regulation 4 would appear to include persons who could make a complaint by or on behalf of a patient by virtue of section 15(3)(a)(i) but it is clear from the terms of section 15(3)(a)(ii) that such persons cannot be specified using the power in section 15(4)(a).

3. In relation to the consequential amendments made by the Schedule, is it intended that the arrangements specified must operate in accordance with any regulations or directions made under **any section** of the 2011 Act rather than those made under section 15? Regulations and directions made under other parts of the Act do not directly relate to the arrangements for complaints procedures. If this wider requirement is intended can the Scottish Government explain the *vires* for making such provision? In particular, if the ancillary power in section 25(1) is relied upon, can the Scottish Government explain why such provision is considered necessary or expedient in consequence of the exercise of the power under section 15(4)?

4. Is the omission of reference to regulations and directions made under section 15 (or the 2011 Act) from the amendment made by paragraph 3(5) of the Schedule intentional?

5. Why is the reference to the 2005 Directions considered sufficiently precise to identify them and where copies of the 2005 Directions can be obtained?

The Scottish Government responded as follows:

Question 1

The general policy intention behind the regulations is not to restrict those who may make a complaint in relation to services provided under the health service. If a complaint is made on behalf of another person, for example, where the patient is a child, or where the patient does not consent to the investigation of the complaint, the responsible body would have to take that into account when handling and responding to a complaint. In such circumstances, the responsible body may well be constrained as to what it can do in terms of investigating any such complaint, or in terms of the information which can be included in the report of such an investigation.

Regulation 6(1)(c) provides that the responsible body must send the complainant a report of the investigation into the complaint. In handling a complaint, and in issuing the report, the responsible body must be satisfied that it is acting in accordance with its obligations under Article 8 of the ECHR, and indeed any other obligations it has under the ECHR, or any other law such as the Data Protection Act 1998. These obligations will be highlighted in the revised good practice guidance which is being prepared for issue to the NHS to help support the implementation of the requirements within the legislation.

Question 2

The Scottish Government considers that regulation 4 is competent. The Government accepts that regulation 4 could have been more clearly expressed to clarify that, in specifying such other persons for the purposes of section 15(3)(a)(ii), the intention was not to include persons who could make a complaint by or on behalf of a patient, given that such persons are already specifically referred to in section 15(3)(a)(i) of the Act. However, given that the function of complaining is conferred on certain persons by section 15(3)(a)(i), the Scottish Government considers that it would not be possible to confer that function upon those persons again by means of regulation 4. As such, it is considered that regulation 4 falls to be interpreted as specifying persons only to the extent that they are ‘other persons’ than those referred to in section 15(3)(a)(i).

Question 3

In relation to the consequential amendments made by the Schedule it is intended that, where specified, the arrangements must operate in accordance with any regulations or directions made under any section of the 2011 Act rather than only those made under section 15. The Scottish Government consider that the vires for making such provision can be found in the ancillary powers under section 25(1)(c).

Section 25(1)(c) provides that any power conferred by the Act on the Scottish Ministers to make regulations includes power to make such consequential, supplemental, incidental, transitional, transitory or saving provision as appears to the Scottish Ministers to be necessary or expedient. The Scottish Government is relying on section 25(1)(c) to make supplemental provisions. If we take SSI 2004/115 as an

example, the Scottish Government intends that contractors must establish a complaints system which operates pursuant to section 15, and any regulations or directions made under section 15 of that Act. In addition to that, however, the Scottish Government considers it is expedient to make clear that to the extent that any other regulations or directions made under the Act are relevant to contractors as providers of services under the Health Service, they must act in accordance with such provisions.

Paragraph 94 of SSI 2004/115 is also amended to make clear that the Health Board may vary the contract without the contractor's consent where it is reasonably satisfied that it is necessary to vary the contract so as to comply with the Patient Rights (Scotland) Act 2011, any regulations made pursuant to that Act, or any direction given by the Scottish Ministers pursuant to that Act. The Scottish Government considers that in addition to enabling a Health Board to vary a contract so as to comply with section 15 of the Patient Rights (Scotland) Act 2011, it is expedient to use the supplemental power to ensure that a Health Board is able to vary a contract with a contractor under a general medical services contract in order to comply with the 2011 Act generally. This reasoning carries across to other equivalent amendments made in the Schedule.

To the extent that the Subordinate Legislation Committee does not agree with the Scottish Government's analysis of the scope of section 25(1), the Scottish Government is still satisfied that the provisions in the Schedule are within vires as a consequence of the general enabling powers cited (i.e. "and all other powers enabling them to do so"). The Court of Appeal's conclusions in the Vibixa case[1] confirm that general enabling powers in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked in situations such as where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked the power. Whilst Vibixa is an English case, the Scottish courts are likely to find it persuasive. The Scottish Government is therefore able to rely on powers under the National Health Service (Scotland) Act 1978 in taking forward the amendments in the Schedule (namely sections 17E, 17N, 25, 26, 27, 105(7) and 108(1) of the 1978 Act) by virtue of the general enabling powers cited.

Question 4

The omission of reference to regulations and directions made under section 15 of the 2011 Act is intentional in the amendment made by paragraph 3(5) of the Schedule. The same is true of the amendments made by paragraphs 5(4) and 6(4) of the Schedule. These paragraphs relate to amendments made to provisions about the co-operation with investigations of a complaint by a Health Board. If we take the amendments to SSI 2006/135 as an example, the Scottish Government considers that the wording "shall cooperate with any investigation of a complaint by the Board in accordance with the procedures which it operates in accordance with section 15 of the Patient Rights (Scotland) Act 2011" is sufficient to capture any regulations or directions made under section 15 of the 2011 Act. In this instance the Scottish Government does not intend to capture regulations and directions made under *any* section of the 2011 Act, only those under section 15.

[1] Vibixa Ltd v Komori UK Ltd & Ors [2006] EWCA Civ 536, see paragraphs 13 and 21.

Question 5

The Scottish Government considers that the reference to the 2005 Directions is sufficiently precise to identify the Directions. Regulation 1(2) specifies the title of the Directions, the date when the Directions were made and the date when the Directions were brought into force. There are no other Directions given to Health Boards, Special Health Boards and the Agency on Complaints Procedure which were made and brought into force on these dates. Copies of the 2005 Directions are available at: http://www.sehd.scot.nhs.uk/mels/HDL2005_15.pdf and are also included as Part 5 of the 2005 "Can I Help You?" guidance available at: http://www.show.scot.nhs.uk/App_Download/pdf/1guidance010405.pdf. Copies of the 2005 Directions can be obtained from the Scottish Government Health Directorate.

Consideration of subordinate legislation - instruments not subject to any Parliamentary procedure

Note by the Clerk

The Committee will be considering an instrument not subject to parliamentary procedure today. This is the first instrument of this type that the Committee has considered. Information on the nature and procedure for dealing with these instruments is set out below.

Background

Prior to the Interpretation and Legislative Reform (Scotland) Act 2010, seven different types of SSI procedure were recognised in enabling legislation in Scotland. The 2010 Act simplified this categorisation and there are now three main types of instruments – negatives, affirmatives and laid only. Scottish Parliament Standing Orders were recently updated to reflect these changes.

Despite these changes, affirmative and negative instruments will continue to be the main categories considered by lead committees. However, under Rule 10.1.3 of Standing Orders, *any instrument* laid before the Parliament is to be referred to a lead committee for consideration. This includes instruments laid only but not subject to any parliamentary procedure, which prior to the 2010 Act were not previously considered by lead committees.

This requirement is an unintended consequence of the recent rule changes and it is expected to be addressed in the next round of minor rule changes by the Standards, Procedures and Public Appointments Committee. You will be kept advised of any changes.

Consideration of instruments not subject to parliamentary procedure

The general interpretation of standing orders has been that “consideration” involves an active committee decision on the agenda; however this could include a decision simply to take note.

As it is expected that the majority of instruments not subject to parliamentary procedure will be relatively straightforward, and in any case since the Parliament ultimately has no direct power over these instruments, such instruments will be accompanied by a brief take note paper on the agenda which need not take up much of the committee’s time.

This does not, of course, preclude the committee from commenting on an instrument if it so wishes.

For consideration at today’s meeting
There is one instrument not subject to parliamentary procedure to be considered today. It was laid in accordance with the requirements set out in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Overview of the instrument

A brief explanation of the instrument is set out below. If members have any queries or points of clarification on the instrument which they wish to have raised with the Scottish Government in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Details on the instrument

The Patient Rights (Scotland) Act 2011 (Commencement) Order 2012 (SSI/2012/35(C.7)) brings into force on 1st April 2012 sections 1 to 7, 14 to 21 and section 23 of, and the schedule to, the Patient Rights (Scotland) Act 2011 ("the 2011 Act"). It brings into force on 1st October 2012 those provisions of the 2011 Act which are not at that date already in force. The Bill for the 2011 Act received Royal Assent on 31st March 2011. Sections 22, 24, 25 and 26 came into force on Royal Assent.

The Subordinate Legislation Committee has not drawn the instrument to the Health and Sport Committee's attention.

Recommendation

The Committee is invited to consider and note this instrument.

Dougie Wands
Clerk to the Committee